

LINDA LINGLE
GOVERNOR



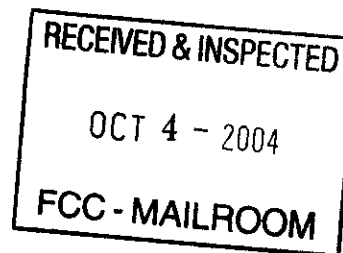
CARLITO P. CALIBOSO
CHAIRMAN

WAYNE H. KIMURA
COMMISSIONER

JANET E. KAWELO
COMMISSIONER

STATE OF HAWAII
PUBLIC UTILITIES COMMISSION
DEPARTMENT OF BUDGET AND FINANCE
465 S. KING STREET, #103
HONOLULU, HAWAII 96813

September 29, 2004
DOCKET FILE COPY ORIGINAL



Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 - 12th Street, S.W.
Washington, D.C. 20554

Re: Information Relating to the Hawaii Public Utilities Commission's Proceeding to Implement the *Triennial Review Order*, Submitted In Response to Order and Notice of Proposed Rulemaking, FCC 04-179, WC Docket No. 04-313 and CC Docket No. 01-338

Dear Ms. Dortch:

The Federal Communications Commission ("FCC"), in its Order and Notice of Proposed Rulemaking released on August 20, 2004 in WC Docket No. 04-313 and CC Docket No. 01-338, acknowledged state commissions' proceedings to implement the *Triennial Review Order* ("TRO") and encouraged state commissions to submit summaries of their state proceedings. Accordingly, the Hawaii Public Utilities Commission ("Commission") hereby submits the enclosed summary of proceedings and index and copies of particular documents filed in Docket No. 03-0272, an investigative docket the Commission opened in September 2003 to implement the FCC's TRO. While the Commission's investigation did not lead to granular impairment analyses with respect to markets in the State of Hawaii, we nonetheless submit the enclosures for the FCC's information as it moves forward in establishing sustainable new unbundling rules under sections 251(c) and 251(d)(2) of the Telecommunications Act.

Please contact Brooke K. Kane, Administrative Director, at (808) 586-2020 to address any questions concerning this matter.

Sincerely,

A handwritten signature in cursive script, reading "Carlito P. Caliboso".

Carlito P. Caliboso
Chairman

CPC:LYK:sl

Enclosures

c: Division of Consumer Advocacy (w/ summary and index only)

OCT 4 - 2004

FCC - MAILROOM

HAWAII PUBLIC UTILITIES COMMISSION

DOCKET NO. 03-0272

INSTITUTING A PROCEEDING

TO IMPLEMENT THE FEDERAL COMMUNICATIONS COMMISSION'S
TRIENNIAL REVIEW ORDER, FCC NO. 03-36SUMMARY OF PROCEEDINGS

On September 29, 2003, the Hawaii Public Utilities Commission ("Commission") issued Order No. 20471 opening Docket No. 03-0272 to implement requirements of the Federal Communications Commission's ("FCC") *Triennial Review Order* ("TRO") that had been delegated to the state commissions. Through a bifurcated process, the Commission ordered the initiation of two distinct and separate reviews: (1) Part I to conduct a 90-day review – triggered by the filing of a motion to proceed by a competitive local exchange carrier ("LEC") – of the FCC's national finding that competitors are not impaired without unbundled access to incumbent LEC circuit switching when serving DS-1 enterprise customers; and (2) Part II to conduct a 9-month review – which the Commission assumed to be sustainable – of the FCC's finding that competitive LECs are impaired without access to unbundled local switching for mass-market customers on a national basis and to review the possibility of implementing a batch hot cut process.

Parties to a separate, ongoing communications competition docket (Docket No. 7702) were made parties to this new proceeding. They were: The Department of Commerce and Consumer Affairs, Division of Consumer Advocacy; AT&T Communications of Hawaii, Inc. ("AT&T"); Pacific LightNet, Inc.; Sprint Communications Company, L.P. ("Sprint"); Time Warner Telecom of Hawaii, L.P. dba Oceanic Communications; the U.S. Department of Defense and All Other Federal Executive Agencies; and Verizon Hawaii Inc. ("Verizon Hawaii"). Subsequently, the Commission approved Sprint's request to withdraw from Docket No. 03-0272 and approved motions to intervene filed by Direct Telephone Company Inc., Sandwich Isles Communications, Inc., and MCI Metro Access Transmission Services, Inc., subject to conditions.

In response to Order No. 20471, Verizon Hawaii filed a letter dated October 20, 2003, indicating that with regard to Part I, it "does not propose to proceed and does not believe that any proceeding can be sustained." Furthermore, Verizon Hawaii stated that no proceeding is required for Part II, since it had determined that "it will not challenge the FCC's impairment findings in Hawaii during the period allowed for a 9-month case." On October 28, 2003, AT&T filed a response stating, among other things, that regardless of Verizon Hawaii's position that no proceeding is required for Part II, the Commission should proceed with Part II in order to define "mass market" by establishing the demarcation point between mass market and enterprise market through a determination of the appropriate number of DS-0 loops that a competitive LEC

may provision to a specific customer location in combination with incumbent provided switching.¹

On December 11, 2003, the Commission issued Order No. 20712 in which the Commission recognized that no party had filed a motion to proceed with Part I of the docket and concluded that it would not undertake the 90-day review allowed for in the *TRO*. Relating to Part II, the Commission found that it would be premature to assume that a 9-month review is unnecessary and ordered the parties to meet to formulate a stipulated prehearing order to govern Part II.

On January 15, 2004, the Commission issued Prehearing Order No. 20762, which set forth the following issues to be addressed in Part II:

- (1) What is the appropriate cross over point between enterprise and mass-market customers?
- (2) What type of procedures should be developed to conduct continued reviews for the unbundled loops, transport and switching under §§ 340, 418, 526 and 534 of the *TRO*? Should the procedures include a notification requirement?

Following exchanges of information requests and responses to information requests, the parties informed the Commission on February 20, 2004, that they had reached agreement on resolution of the two (2) issues in Part II of the proceeding. The agreement was formally memorialized in a stipulation filed with the Commission on March 12, 2004, which included the following:

- (1) The Commission need not conduct any impairment or other related reviews at this time, including any review of the appropriate cross over point between enterprise and mass-market customers.
- (2) Any review of the cross over point shall be conducted only in the context of a general proceeding initiated by the Commission, *sua sponte*, or pursuant to a petition of a telecommunications carrier seeking to challenge the impairment presumptions for enterprise switching or for mass-market switching ("Impairment Proceeding").
- (3) Upon the commencement of any such Impairment Proceeding, notice shall be given to all certificated telecommunications providers in the State. The parties in Docket No. 03-0272 shall be parties to the Impairment Proceeding, and interested parties may move to intervene. After the Commission determines the parties to the Impairment Proceeding, the parties to the Impairment Proceeding shall file a stipulated prehearing order or, if no stipulation is reached, separate

¹ Verizon Hawaii filed a response letter on November 7, 2003 stating, among other things, that it opposed AT&T's assessment of Verizon Hawaii's position on the issue of developing a batch hot cut process and asserts that AT&T's suggestion that a new batch cut process must be developed conflicts with the *TRO*.

proposed prehearing orders, within the time specified by the Commission.

- (4) The FCC's four-line switching "carve-out," which prior to the FCC's *TRO* was applicable in density zone one (1) of the top fifty (50) Metropolitan Statistical Areas, does not currently apply in Hawaii. This agreement does not preclude the parties from advocating a different cross over point in any subsequent proceeding.

On March 31, 2004, the Commission issued Order No. 20881, which approved the parties' stipulation in its entirety and closed Docket No. 03-0272.

HAWAII PUBLIC UTILITIES COMMISSION
DOCKET NO. 03-0272
INSTITUTING A PROCEEDING
TO IMPLEMENT THE FEDERAL COMMUNICATIONS COMMISSION'S ("FCC")
TRIENNIAL REVIEW ORDER ("TRO"), FCC NO. 03-36

INDEX OF KEY DOCUMENTS

Document	Filing Party	Date Filed
Order No. 20471 initiating Docket No. 03-0272 to implement FCC's <i>TRO</i> via a bifurcated proceeding: (1) a 90-day review of FCC's no impairment finding relating to switching for enterprise customers ("Part I") and (2) a 9-month review on presumption that CLECs are impaired without access to switching for mass market customers ("Part II")	Public Utilities Commission	September 29, 2003
Letter notifying PUC that Verizon Hawaii Inc. does not propose to proceed with Part I and that a proceeding for Part II is not required, since it will not challenge the presumption that CLECs are impaired without access to mass market switching	Verizon Hawaii Inc.	October 20, 2003
Letter urging PUC to proceed with 9-month review in order to define "mass market"	AT&T Communications of Hawaii, Inc.	October 28, 2003
Letter responding to AT&T Communications of Hawaii Inc.'s October 28, 2003 letter	Verizon Hawaii Inc.	November 7, 2003
Order No. 20712 ordering that PUC will not undertake the 90-day review in Part I and that parties shall meet to formulate a stipulated prehearing order to govern Part II, the 9-month review on mass market switching	Public Utilities Commission	December 11, 2003
Protective Order No. 20761 covering confidential information identified during course of Part II	Public Utilities Commission	January 15, 2004
Prehearing Order No. 20762 setting forth issues, schedule and other matters governing Part II	Public Utilities Commission	January 15, 2004
Letter notifying the PUC that parties have reached agreement on issues in Part II	Verizon Hawaii Inc.	February 20, 2004
Stipulation memorializing parties' agreement on issues in Part II	All Parties	March 12, 2004
Order No. 20881 approving parties' stipulation and closing Docket No. 03-0272	Public Utilities Commission	March 31, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

----- In the Matter of -----)
)
PUBLIC UTILITIES COMMISSION)
)
Instituting a Proceeding to)
Implement the Federal)
Communications Commission's)
("FCC") *Triennial Review Order*,)
FCC No. 03-36.)
_____)

DOCKET NO. 03-0272

ORDER NO. 20471

Filed Sept. 29, 2003
At 11:00 o'clock A.M.

Karen Higdon
Chief Clerk of the Commission

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

----- In the Matter of -----)
)
PUBLIC UTILITIES COMMISSION)
)
Instituting a Proceeding to)
Implement the Federal)
Communications Commission's)
("FCC") Triennial Review Order,)
FCC No. 03-36.)
_____)

Docket No. 03-0272

Order No. 20471

ORDER

I.

On August 21, 2003, the Federal Communications Commission ("FCC") released its *Triennial Review Order*.¹ Through its TRO, the FCC established new rules governing the obligations of incumbent local exchange carriers ("ILECs") to make elements of their network available on an unbundled basis to competitive local exchange carriers ("CLECs") and, among other things, delegated to state commissions the task of undertaking proceedings to determine the unbundling obligations of ILECs concerning certain network elements in specific

¹In *Re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability*; CC Docket Nos. 01-338, 96-98, and 98-147; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking; FCC No. 03-36; Adopted February 20, 2003; Released August 21, 2003 ("*Triennial Review Order*" or "*TRO*").

geographic markets, pursuant to section 251(d)(2) of the Telecommunications Act of 1996 (the "Act").²

The FCC instructed state commissions to conduct and complete "granular" proceedings within the framework of the TRO. First, state commissions are given ninety (90) days from the effective date of the order³ to rebut the FCC's "national finding" of no impairment for switching for large business customers (also known as enterprise customers), served by high-capacity loops, such as DS-1s ("90-day Review").⁴ Second, state commissions are given nine (9) months from the effective date of the order to determine whether or not economic and operational impairment exists in particular geographic markets for mass-market customers (referring to residential and very small business customers) under the new FCC test for "impairment" ("9-month Review").⁵

This proceeding is being initiated to implement the FCC's *Triennial Review Order* in the State of Hawaii (the "State"). We initiate our investigation in this docket,

²The Act, Public Law No. 104-104, amended the Communications Act of 1934, Title 47 of the United States Code ("U.S.C."). Section references in this docket are, thus, to those in 47 U.S.C., as amended by the Act.

³The *Triennial Review Order* was published in the Federal Register on September 2, 2003. Applying the normal reply comment period, thirty (30) days from publication, the effective date of the order is October 2, 2003.

⁴With an effective date of October 2, 2003, the 90-day timeframe expires on or about Tuesday, December 30, 2003.

⁵With an effective date of October 2, 2003, the 9-month timeframe expires on Friday, July 2, 2004.

sua sponte, in accordance with the federal requirements of the TRO and the Act, and pursuant to our general investigative powers set forth in Hawaii Revised Statutes ("HRS") § 269-7 and Hawaii Administrative Rules ("HAR") § 6-61-71.

II.

To fulfill the purposes of docket, the commission acknowledges that it must solicit the participation of the State's sole ILEC, VERIZON HAWAII INC. ("Verizon Hawaii"); the various CLECs that operate in the State; the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate")⁶; and other interested stakeholders. We note that many of the above-mentioned entities and organizations are parties to the commission's on-going proceeding in Docket No. 7702. Accordingly, and due to the short timeframes set forth in the TRO for the commission to complete its reviews, we find it reasonable at this time to make the parties of Docket No. 7702, parties to the proceedings in this docket.⁷

⁶Pursuant to HAR § 6-61-62, the Consumer Advocate is an ex officio party to every proceeding before the commission.

⁷Docket No. 7702 is a commission initiated proceeding investigating the communications infrastructure of the State. Through Docket No. 7702, the commission addressed, resolved, and facilitated the implementation of many issues and concerns involving the telecommunications industry including, but not limited to, the development and adoption of Title 6, Chapter 80, HAR, the commission's rules on *Competition in Telecommunications Services*; compliance with the Act and Act 225, Session Laws of Hawaii 1995; and the establishment of rates for unbundled network elements ("UNEs"). In light of the extensive work and reviews accomplished in Docket No. 7702, we believe that the parties of Docket No. 7702 will be able to assist and contribute in the development of a sound record in this docket.

The record of Docket No. 7702 indicates that the current parties to the docket are:

- (a) The Consumer Advocate;
- (b) AT&T COMMUNICATIONS OF HAWAII, INC. ("AT&T");
- (c) PACIFIC LIGHTNET, INC. ("PLNI");
- (d) SPRINT COMMUNICATIONS COMPANY, L.P. ("Sprint");
- (e) TIME WARNER TELECOM OF HAWAII, L.P., dba OCEANIC COMMUNICATIONS ("Oceanic");
- (f) UNITED STATES DEPARTMENT OF DEFENSE AND ALL OTHER FEDERAL EXECUTIVE AGENCIES ("DOD"); and
- (g) Verizon Hawaii.

The commission will expect all parties to this proceeding to fully participate in the development of the procedures and issues necessary to conduct the reviews under the federal guidelines of the TRO and consistent with all State laws and commission rules and regulations. If determined necessary, the parties to this proceeding will also be expected to actively participate in all elements of contested case proceedings in this docket. The commission is aware that similar proceedings are being conducted in other states and territories under the regulatory jurisdiction of the FCC, and we recognize that some members of the newly named parties to this proceeding, i.e., the current Docket No. 7702 parties (referred to in this order as the "Initial TRO Parties") may not have the necessary time and resources to fully participate as a party in this docket. Accordingly, within twenty (20) days of the date of this order, the Initial TRO Parties must either: (1) file a letter notifying

the commission of its duly authorized representative(s) for the proceedings in **this** docket in accordance with HAR § 6-61-12, or (2) submit a written request for commission approval to withdraw from the proceedings in this docket.

Additionally, any interested individual, entity, or community or business organization is invited to file a motion to intervene or participate without intervention in this docket in compliance with our rules set forth in HAR Chapter 6-61, Subchapter 4. We do this to encourage public input and to ensure, as much as possible, a comprehensive examination of issues involved in the implementation of the TRO.⁸

III.

The commission will, on its own initiative, conduct the reviews in this docket, in light of the *Triennial Review Order*, concurrently in two distinct and separate parts in accordance with HAR § 6-61-39. Part I of this proceeding will delve into the issues and concerns surrounding the 90-day Review, while the commission's 9-month Review will be conducted in Part II of this proceeding.

⁸We will make every effort to notify all interested individuals of the initiation of this docket. To this end, we expect to, among other things, place this order on our Internet website, at <http://www.state.hi.us/budget/puc/puc.htm>, and mail this order to every telecommunications provider who is duly authorized to operate in our State.

A.

Part I: 90-day Review

With regards to Part I of this proceeding, the FCC made "a national finding that competitors are not impaired without unbundled access to incumbent LEC local circuit switching when serving DS[-]1 enterprise customers."⁹ The FCC clarified that such a finding means "denial of access to unbundled switching would not impair a competitor's ability to serve the enterprise markets, including all customers which are served by the competitor over loops of DS[-]1 capacity and above."¹⁰ (Referred to in this order as the "No Impairment Finding".) The FCC gives states ninety (90) days to rebut its No Impairment Finding "in individual markets based on specific operational evidence regarding loop, collocation, and transport provisioning and specific economic evidence including the actual deployment of competitive switches and competitors' costs in serving enterprise customers."¹¹

In light of the guidelines set forth in the TRO and due to the short period of time given for the commission to rebut the FCC's No Impairment Finding, we believe that it is reasonable to go forward with the 90-day Review of the FCC's No Impairment Finding upon a filing of a motion for the commission to proceed ("Motion to Proceed") by a CLEC within twenty (20) days of the

⁹See, TRO at ¶ 421.

¹⁰See, TRO at ¶ 453.

¹¹See, TRO at ¶ 421.

date of this order. Along with its Motion to Proceed, the CLEC must also file sufficient evidence to support its position that the FCC's No Impairment Finding should be rebutted. To proceed without such a motion would result in a waste of the commission's resources and impede the commission's ability to timely address this matter. Additionally, the CLEC filing the motion: (1) must also timely file and qualify for party status under HAR § 6-61-55, if not already named as a party; (2) must be prepared to set forth or facilitate the production of all the evidence necessary to rebut the FCC's No Impairment Finding; and (3) shall bear the burden of proof with regards to this matter. If no such motion is filed within the required time, the commission will consider the 90-day review as unsustainable, and Part I of this proceeding may be concluded. However, if a Motion to Proceed is filed, the commission will allow the Initial TRO Parties and those who timely filed for intervention in this proceeding five (5) days to provide comments on the Motion to Proceed.

B.

Part II: 9-month Review

With regards to Part II of this proceeding, the commission will move forward with its analysis under the assumption that a 9-month Review is sustainable. The FCC made a finding that CLECs are impaired without access to unbundled local

switching for mass-market customers on a national basis.¹² Finding that economic and operational barriers for the cut over process result in the impairment, the FCC specifically ordered state commissions, within nine (9) months of the effective date of the TRO, to "approve and implement a batch cut process that will render the hot cut process more efficient and reduce per-line hot cut costs."¹³ In the alternative, the FCC requires state commissions to issue detailed findings that support the conclusion that the ILEC's current hot cut process, in a particular geographic market, does not impair competitors and that a batch cut process is therefore not necessary.¹⁴ The commission will address its hot cut/batch cut obligations for local switching and all other issues including those related to high capacity loops and dedicated transport under the FCC's 9-month deadline for mass-market customers in Part II of this proceeding.

After the requisite intervention period and the issuance of a commission order determining the parties and/or participants to this docket, the commission will require the parties to meet informally to develop a stipulated protective order, if necessary, and stipulated procedural/prehearing order to govern the matters of Part II of this proceeding for the

¹²See, TRO at ¶ 459.

¹³See, TRO at ¶¶ 459 and 460.

¹⁴See, TRO at ¶ 460.

commission's review and consideration.¹⁵ If the parties are not able to stipulate, each party will be required to file proposed orders for the commission's consideration. More specific directions and guidelines on these matters are forthcoming; however, we will strive towards dispensing with all procedural matters of Part II of this docket by the end of November 2003.

IV.

THE COMMISSION ORDERS:

1. A proceeding is initiated to implement the FCC's *Triennial Review Order*.

2. The current Docket No. 7702 parties--the Consumer Advocate, AT&T, PLNI, Sprint, Oceanic, DOD, and Verizon Hawaii--shall be made parties to this proceeding, as the Initial *TRO* Parties. Within twenty (20) days of the date of this order, the Initial *TRO* Parties shall either: (1) file a letter notifying the commission of its duly authorized representative(s) for the proceedings in **this** docket in accordance with HAR § 6-61-12, or (2) submit a written request for commission approval to withdraw from the proceedings in this docket.

3. Any individual, entity, or organization desiring to intervene as a party or to participate without intervention in

¹⁵The stipulated protective order will also apply to Part I of proceeding in this docket; however, we will require the parties to file a separate stipulated procedural/prehearing order for Part I of this proceeding, if it is deemed sustainable.


this proceeding shall file a motion to intervene or participate without intervention not later than twenty (20) days of the filing of this order. Motions to intervene or participate without intervention must comply with all applicable rules of HAR Chapter 6-61, *Rules of Practice and Procedures Before the Public Utilities Commission*.

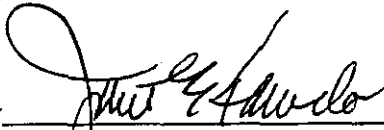
4. Any CLEC who wishes to rebut the FCC's no impairment finding for switching for large business customers that are served by large capacity loops, such as DS-1s, in a 90-day proceeding before the commission shall file a Motion to Proceed within twenty (20) days of the date of this order. Along with its Motion to Proceed, the CLEC must also file sufficient evidence in support of its position that the FCC's No Impairment Finding should be rebutted, and the CLEC will be held to the requirements set forth on this matter in Section III.A. of this order. Comments on the Motion to Proceed, if applicable, will be received through the parameters also set forth in Section III.A. of this order.

DONE at Honolulu, Hawaii this 29th day of September,
2003.

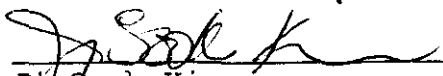
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Ji Sook Kim
Commission Counsel

FCC IRO:eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 20471 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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(Certificate of Service - Continued)

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Karen Higashi

DATED: September 29, 2003